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Ling Peek Hoe & Anor v Golden Star & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–428–02 OF 2012
AZIAH ALI, LIM YEE LAN AND TENGKU MAIMUN JJCA
23 JUNE 2014

Civil Procedure — Striking out — Statement of claim — Paragraphs in statement of claim — Plaintiff in High Court suit sought to set aside transfers of four properties on ground of misrepresentation and fraud — Issue of rental concerning one of properties decided in defendant's favour by sessions court — Whether decision justified striking out references to that property in statement of claim in High Court suit — Whether claim in respect of property in question premised on fraud and not obviously unsustainable — Whether disputed facts in respect of property raised questions fit for trial

The appellants, who were father and son, sued the respondents in the High Court to, inter alia, set aside the transfers of four of their properties on the ground of misrepresentation and fraud. The transfers were done in connection with a loan the first respondent ('Golden Star'), a licensed moneylender, had granted to the first appellant. The second, third and fourth respondents were partners in Golden Star. Prior to the filing of the High Court suit, the second respondent ('R2') had sued the second appellant ('A2') in the sessions court alleging that A2 had failed to pay him rent under a tenancy agreement in respect of one of the four properties ('No 31 Taman Ilmu'). R2 had become the registered owner of No 31 Taman Ilmu as one of the conditions for Golden Star granting the loan to the first appellant. Since the dispute before both the courts concerned No 31 Taman Ilmu, the appellants applied to have the two suits consolidated and heard together. The respondents objected saying the issues in both suits were different. The High Court dismissed the consolidation application ruling that the cause of action in the High Court suit was different from that in the sessions court action and that the two suits ought to be tried separately. When R2 obtained judgment in the sessions court suit, the respondents applied to the High Court under O 18 r 19 of the Rules of the High Court 1980 to strike out all references to No 31 Taman Ilmu in the appellants' statement of claim on the ground all issues concerning that property had been decided by the sessions court and the matter was res judicata. The High Court allowed the application and proceeded with the trial of the appellants' claims in respect of the other three properties and finally granted the declarations sought by the appellants holding that the respondents were guilty of fraudulent misrepresentation. The instant appeal was against the High Court's decision to allow the striking out application.

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Held, allowing the appeal, setting aside the decision of the High Court and remitting the case back to the High Court for trial:

(1) The order of striking out was a drastic one and it was only granted in an obviously unsustainable case. The appellants' claim in respect of No 31 Taman Ilmu was not obviously unsustainable (see paras 16 & 17).

(2) The appellants' claim was premised on, inter alia, fraud. The appeal record showed there were disputed facts which needed investigation in a full trial as to what really transpired between the second respondent and the first appellant in the loan transaction which led to the transfer of No 31 Taman Ilmu from the first appellant to the second respondent. The appellants might have a weak case but that did not warrant the striking out of the relevant paragraphs setting out the facts relating to No 31 Taman Ilmu. The said paragraphs raised some question fit to be tried. The appellants ought to be given their day in court to prove their claims against the respondents (see para 18).

(3) The following circumstances also tilted the appeal in favour of the appellants: the fact the High Court had allowed the appellants' claim in respect of the other three properties; the judgment of the sessions court was pending appeal before the Court of Appeal; and the respondents' position that the issues before the High Court and the sessions court were different. No prejudice would be suffered by the respondents if the relevant paragraphs relating to No 31 Taman Ilmu were reinstated and the claim in respect of same tried in the High Court as that would be consistent with the stand they took in opposing the appellants' application for transfer and consolidation of the sessions court case (see paras 19 & 20).

[Bahasa Malaysia summary

Perayu-perayu yang merupakan bapa dan anak, memulakan guaman terhadap responden di Mahkamah Tinggi, antara lain, mengetepikan pemindahan empat hartanah mereka atas alasan salah nyata dan fraud. Pemindahan dibuat berkaitan dengan pinjaman responden pertama ('Golden Star'), peminjam wang berlesen, yang telah diberikan kepada perayu pertama. Responden kedua, ketiga dan keempat adalah rakan kongsi dalam Golden Star. Sebelum memfailkan guaman Mahkamah Tinggi, responden kedua ('R2') telah memulakan tindakan guaman terhadap perayu kedua ('A2') di mahkamah sesyen mendakwa bahawa A2 gagal untuk membayar sewa kepadanya di bawah perjanjian sewa berkaitan dengan satu daripada empat hartanah ('No 31 Taman Ilmu'). R2 telah menjadi pemilik berdaftar kepada No 31 Taman Ilmu sebagai satu daripada syarat-syarat bagi Golden Star memberikan pinjaman kepada perayu pertama. Sejak pertikaian di hadapan kedua-dua mahkamah berkenaan No 31 Taman Ilmu, perayu-perayu memohon supaya kedua-dua guaman dihimpunkan dan didengar bersama. Responden-responden

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membantah dengan mengatakan isu-isu di dalam kedua-dua guaman adalah berbeza. Mahkamah Tinggi menolak keputusan permohonan disatukan bahawa sebab tindakan dalam guaman di Mahkamah Tinggi adalah berbeza daripada tindakan di mahkamah sesyen dan bahawa kedua-dua guaman sepatutnya tidak didengar berbeza. Apabila R2 mendapatkan keputusan guaman di mahkamah sesyen, responden-responden memohon ke Mahkamah Tinggi di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi untuk membatalkan kesemua rujukan-rujukan terhadap No 31 Taman Ilmu di dalam penyata tuntutan perayu untuk alasan-alasan berkaitan hartanah yang telah diputuskan oleh mahkamah sesyen dan perkara itu adalah *res judicata*. Mahkamah Tinggi membenarkan permohonan dan meneruskan perbicaraan tuntutan perayu berkaitan dengan tiga hartanah yang lain dan akhirnya memberikan deklarasi yang dipohon oleh perayu memutuskan bahawa responden-responden bersalah dengan salah nyata dan fraud. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi untuk membenarkan permohonan pembatalan.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan meremitkan kes kembali ke Mahkamah Tinggi untuk perbicaraan:

(1) Perintah pembatalan adalah suatu yang drastik dan ia adalah dibenarkan dalam kes yang nyata tidak mampan. Tuntutan perayu berkaitan No 31 Taman Ilmu ternyata bukan tidak mampan (lihat perenggan 16 & 17).

(2) Tuntutan perayu adalah berdasarkan, antara lain, fraud rekod rayuan menunjukkan terdapat fakta dipertikaikan yang perlu disiasat dalam perbicaraan penuh apa yang sebenarnya berlaku antara responden kedua dan perayu pertama dalam transaksi pinjaman yang membawa kepada pemindahan No 31 Taman Ilmu daripada perayu pertama kepada responden kedua. Perayu-perayu mungkin tidak mempunyai kes yang kukuh tetapi itu tidak mewajarkan pembatalan perenggan-perenggan relevan yang menyatakan fakta-fakta berkaitan No 31 Taman Ilmu. Perenggan-perenggan itu menimbulkan persoalan yang boleh dibicarakan. Perayu-perayu sepatutnya dibenarkan untuk membawa kes mereka ke hadapan mahkamah untuk membuktikan tuntutan mereka terhadap responden-responden (lihat perenggan 18).

(3) Keadaan-keadaan berikut juga turut memihak kepada perayu-perayu: fakta bahawa Mahkamah Tinggi telah membenarkan tuntutan perayu-perayu berkaitan tiga hartanah lain; keputusan mahkamah sesyen yang menunggu rayuan di Mahkamah Rayuan; dan kedudukan responden bahawa isu-isu di hadapan Mahkamah Tinggi dan mahkamah sesyen adalah berbeza. Tiada prejudis yang akan dialami oleh responden-responden jika perenggan-perenggan yang relevan berkaitan No 31 Taman Ilmu dimasukkan semula dan tuntutan berkenaan yang sama dibicarakan di Mahkamah Tinggi memandangkan ia adalah

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konsisten dengan pendirian yang diambil oleh mereka dalam menentang permohonan perayu-perayu untuk pemindahan dan penyatuan kes mahkamah sesyen (lihat perenggan 19–20).]

Notes

For cases on statement of claim, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8503–8559.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(d)

Appeal from: Civil Suit No 22–203 of 2006 (High Court, Ipoh)

Edmund Lim Yun (Hong Chew King & Co) for the appellants.
Chan Kok Keong (Norazali Nordin with him) (Chan & Assoc) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is an appeal by the plaintiffs against the order of the High Court in striking out the whole of paras 7.6, 7.7, 9.2 and part of paras 9.1 and 9.3 of the plaintiffs' statement of claim. The order was made pursuant to the application filed by the second, third, fourth and fifth defendants ('the defendants') under O 18 r 19(1)(d) of the Rules of the High Court 1980. For convenience, parties will be referred to as they were in the High Court.

[2] Briefly, the background facts and the circumstances of the dispute between the parties are as follows. The first plaintiff and the second plaintiff are the father and son, respectively. The first defendant is an advocate and solicitor while the second defendant is a licensed moneylender. The third to the fifth defendants are the partners in the firm of the second defendant. The first plaintiff had obtained a loan from the second defendant. The documentation for the said loan was prepared by the first defendant, the sister of the third to the fifth defendants.

[3] In August 2006, the plaintiffs filed an action in the High Court Ipoh against the defendants seeking for declaration and damages. In essence, the plaintiffs alleged that in relation to the loan transaction, the defendants had

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perpetrated fraud on the plaintiffs in respect of four properties belonging to the plaintiffs. The properties are:

(a) PN 104828 Lot No 34911 (*dahulu* HS (D) Dgs 5664 PT 17562) Mukim Sitiawan (No 59 Taman Ilmu);

(b) GM 3896 (*dahulu* EMR 2358) Lot 2563 Mukim Sitiawan (No 2563 Kg Selamat);

(c) GM 3895 (*dahulu* EMR 2359) Lot 2564 Mukim Sitiawan (No 2564 Kg Selamat); and

(d) PN 104836 Lot 34919 Mukim Sitiawan (No 31 Taman Ilmu).

[4] The relevant paragraphs of the statement of claim which form the subject matter of the striking out application by the defendants are reproduced below:

> 7.6 Pada atau lebih kurang akhir 2000, Perwira Affin Bank cuba melelong Rumah kedai P1 di P.N. 104836 Lot 34919 ... ('No 31 Taman Ilmu') melalui Saman Pemula No 24-635-97 Permohonan Pelaksanaan No 38-102-98. D2 tahu bahawa Plaintif-Plaintif bergantung kepada pemiagaan mereka di No 31 Taman Ilmu untuk servis Transaksi Pinjaman tersebut, menawarkan untuk membantu Plaintif-Plaintif dengan cara berikut:
>
> (i) D2 akan melanjutkan satu pinjaman tambahan sebanyak RM275,000-00 dengan faedah pada 1.2% sebulan untuk membolehkan P1 menebus No 31 Taman Ilmu daripada Perwira Affin Bank Bhd ('Pinjaman Tambahan tersebut'). Pinjaman Tambahan tersebut akan berada dalam bentuk satu perjanjian jual beli olok-olok dengan P1 yang mesti dibuat di Firma D1, yang bertarikh 23 November 2000 (Perjanjian Jual Beli Olok-Olok tersebut). D3 berjanji bahawa walaupun No 31 Taman Ilmu akan berada di atas nama beliau, P1 masih pemilik sebenar No 31 Taman Ilmu dan berhak menebus balik sama bila-bila masa, asalkan Pinjaman Tambahan tersebut diselesaikan.
>
> (ii) Pada atau lebih kurang 5 November 2003, P2 hendak menjalankan perniagaan kedai kopi di No 31 Taman Ilmu dan memerlukan satu perjanjian sewa bagi tujuan memohon lesen perniagaan daripada Majlis Perbandaran Manjung. D3 bersetuju memberikan perjanjian sewa olok-olok untuk tujuan tersebut dan meminta P2 pergi ke Firma D1 untuk menyediakan sama ('Perjanjian Sewa Olok-Olok tersebut'). Tiada terma-terma dalam Perjanjian Sewa Olok-Olok tersebut dilaksanakan atau diikuti oleh mana-mana pihak daripada titik permulaannya.
>
> 7.7 Pada atau lebih kurang awal 2004, Plaintif-Plaintif mendapat pembeli ('Pembeli tersebut') untuk No 31 Taman Ilmu dengan harga RM480,000. Selanjutnya:
>
> (i) D2 menyediakan satu Penyata Akaun untuk Pinjaman Tambahan tersebut yang menunjukkan baki RM392.559.94 setakat 1/7/2004

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dan P2 dan D3 menandatangani satu perjanjian jual beli olok-olok bertarikh 14/2/2004 di Firma D1 untuk penebusan No 31 Taman Ilmu supaya Pembeli tersebut boleh membeli sama daripada Plaintif-Plaintif.

(ii) Beli balik tersebut gagal kerana D3 berkeras bahawa P1 pergi ke Firma D1 untuk tandatangan satu dokumen menyesahkan bahawa beliau tidak lagi mempunyai sebarang tuntutan terhadap D2 dan/atau pemilik-pemiliknya berkenaan Transaksi Pinjaman tersebut. Oleh kerana P1 enggan berbuat demikian, D3 enggan meneruskan dengan perjanjian jual beli olok-olok tersebut dengan P2.

8. ...

9. Akibat daripada perbuatan Defendan-Defendan di atas, Plaintif-Plaintif telah mengalami kerugian dan kehilangan, di mana Plaintif-Plaintif menuntut:

9.1 Deklarasi bahawa perjanjian jual beli yang didakwa untuk No 2563 dan 2564 Kg Selamat dan No 31 Taman Ilmu adalah batal dan tidak sah;

9.2 Deklarasi bahawa Perjanjian Sewa Olok-Olok tersebut adalah batal dan tidak sah;

9.3 Deklarasi bahawa Borang Pindahmilik yang didakwa untuk 3 Hartanah tersebut dan No 31 Taman Ilmu daripada P1 kepada D2 dan/atau pemilik-pemiliknya adalah batal dan tidak sah atas sebab salahnyata, frod, pemalsuan dan/atau instrumen tidak cukup atau tidak sah;

[5] Prior to the filing of the High Court action by the plaintiffs, the third defendant had filed a suit against the second plaintiff in the sessions court. In the sessions court, where the parties were in the reverse position, the plaintiff therein pleaded that he was the registered owner of No 31 Taman Ilmu; that he had entered into a tenancy agreement with the defendant and that in breach of the tenancy agreement, the defendant had failed to pay the rent. The plaintiff thus claimed against the defendant for the following reliefs (p 105 RR):

(a) Wang sejumlah RM40,500 sebagai sewa yang tertunggak;

(b) Defendan dalam tempoh masa empat (14) hari daripada tarikh penghakiman ini memberi milikan kosong ke atas Premis tersebut yang cerobohi oleh Defendan kepada Plaintif;

(c) Mesne profit atau sewa berganda dikira pada kadar RM3,000.00 sebulan dikira daripada 01.05.2006 sehingga tarikh milikan kosong diberikan oleh Defendan kepada Plaintif;

(d) Faedah pada kadar 8% setahun atas dasar kiraan harian ke atas jumlah penghakiman yang dikira daripada tarikh saman ini sehingga penyelesaian penuh jumlah tersebut;

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(e) Kos; dan

(f) Lain-lain relif dan/atau perintah yang difikirkan adil dan berpatutan oleh Mahkamah yang Mulia ini.

[6] The second plaintiff filed his defence and counterclaim in the sessions court. The defence and counterclaim was premised on similar facts pleaded in the plaintiffs' claim against the defendants in the High Court.

[7] Given that there are now two separate suits relating to the same property No 31 Taman Ilmu, the plaintiffs vide encl 66, applied to the High Court for an order that the sessions court suit be transferred to the High Court, to be consolidated and heard together with the High Court suit. The grounds of the application for transfer and consolidation as averred by the second plaintiff are (pp 60-61 RR):

(a) Ia melibatkan pihak yang sama, iaitu Defendan Ke-3 sebagai Plaintif dan saya sebagai Defendan;

(b) Ia melibatkan subjek perkara yang sama, iaitu rumah kedai No 31, Taman Ilmu, 32000 Sitiawan, Perak;

(c) Ia melibatkan tuntutan dan/atau prayer yang sama, antara lain, deklarasi bahawa perjanjian sewa 5/11/2003 adalah batal dan tidak sah dan deklarasi bahawa borang pindah milik untuk No 31, Taman Ilmu, 32000 Sitiawan, Perak, daripada Plaintif Pertama kepada Defendan Pertama dan/atau Defendan Ke-3 adalah batal dan tidak sah atas sebab salahnyata, frod dan/atau instrument tidak sah; dan/atau

(d) Ia melibatkan persoalan fakta dan/atau undang-undang yang sama, iaitu samada Defendan Ke-3 merupakan pemilik sah kepada rumah kedai di No 31, Taman Ilmu, 32000 Sitiawan, Perak.

[8] The application was opposed by the defendants who took the position that the issues in the High Court and the sessions court are different. The learned High Court judge dismissed the application in encl 66. His Lordship ruled that the cause of action in the High Court was separate from the case in the sessions court and that the two cases ought to be tried separately (p 61 RR).

[9] The matter in the sessions court then proceeded for trial. The plaintiff's claim was allowed by the sessions court and the defendant's counterclaim was dismissed. The defendant's appeal to the High Court was dismissed on ground of technicality. The defendant's appeal to the Court of Appeal is pending.

[10] Having obtained judgment against the second plaintiff in the sessions court, the defendants then moved the High Court to strike out the paragraphs

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in the plaintiff's statement of claim which relate to No 31 Taman Ilmu, as alluded to above.

[11] Principally, the defendants' application (encl 89), was founded on the grounds of res judicata ie that the facts and the law relating to the validity of the tenancy agreement and the transfer of No 31 Taman Ilmu from the first plaintiff to the third defendant had been determined by the sessions court and thus it would be an abuse of process to allow the plaintiffs' claim in respect of the said property, to remain.

[12] The application in encl 89 was allowed by the learned judicial commissioner. Having allowed the defendants' application, the learned judicial commissioner proceeded with the trial of the plaintiffs' claim in respect of the three other properties. At the end of the trial, the learned judicial commissioner found that there was fraudulent misrepresentation by the defendants and granted the declaration prayed for by the plaintiffs.

THE APPEAL

[13] As mentioned above, the appeal before us is against the decision of the learned judicial commissioner in allowing the defendants' application in encl 89. It was the submission of learned counsel for the plaintiffs that the learned judicial commissioner had erred in allowing the defendants' application and in striking out the paragraphs that relate to the plaintiffs' claim for No 31 Taman Ilmu.

[14] Two grounds were advanced by learned counsel. Firstly, that the learned judicial commissioner had failed to appreciate the fact that the High Court had, upon the objection by the defendants of the plaintiffs' application for transfer and consolidation, made an order that the action in the High Court shall proceed independently of the sessions court on the ground that both cases involve different causes of action. Secondly, that the sessions court had no jurisdiction to decide on the validity of the transfer and to make an order of declaration sought for by the plaintiffs.

[15] For the defendants, learned counsel submitted that in allowing the third defendant's claim against the second plaintiff in respect of No 31 Taman Ilmu, the sessions court must have ruled that the tenancy agreement is valid and proper; that the sale and purchase agreement is valid and proper and that the transfer form is valid and proper. If it is otherwise, then surely the sessions court would not have made the order allowing the third defendant's claim and dismissing the second plaintiffs counterclaim. Citing *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, learned counsel submitted

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that the issue of validity of the three documents is res judicata and thus cannot be heard in another trial.

[16] It is trite that the order of striking out is a drastic order and that it is only granted in an obviously unsustainable case (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 M9LJ 36).

[17] Having heard the oral submissions and having read the written submissions and the appeal record, we are of the view that the plaintiffs' claim in respect of the property No 31 Taman Ilmu is not obviously unsustainable.

[18] The plaintiffs' claim against the defendants is premised on, inter alia, fraud. From the appeal record, we find that there are disputed facts which needed investigation in a full trial as to what really transpired between the third defendant and the first plaintiff in the loan transaction which led to the transfer of No 31 Taman Ilmu, from the first plaintiff to the third defendant. The plaintiffs may have a weak case but that does not warrant the striking out of the relevant paragraphs setting out the facts relating to No 31 Taman Ilmu. The said paragraphs had raised some question fit to be tried. The plaintiffs therefore ought to be given their day in court to prove their claim against the defendants.

[19] Further, it is our view that the following circumstances tilt in favour of the plaintiffs. The learned judicial commissioner had allowed the plaintiffs' claim in respect of the three other properties; the judgment of the sessions court is pending appeal in the Court of Appeal and the defendants' position had been that the issues before the High Court and the sessions court are different.

[20] The defendants will suffer no prejudice if the relevant paragraphs relating to No 31 Taman Ilmu were to be reinstated and the plaintiffs' claim in respect of the same be tried in the High Court as this would be consistent with the defendants' stand taken in opposing the plaintiff's application for transfer and consolidation of the sessions court case.

[21] Based on the foregoing, we allow the plaintiffs' appeal. We set aside the order of the High Court. We remit the case to the High Court for trial. Costs of RM10,000 is to be paid by the defendants to the plaintiffs. Deposit is to be refunded to the plaintiffs.

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A *Appeal allowed, decision of the High Court set aside and case remitted back to the High Court for trial.*

Reported by Ashok Kumar

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